



January 26, 2006

TO: Transportation Authority of Marin Commissioners

FROM: Dianne Steinhauser, Executive Director

RE: Adoption of Disadvantaged Business Enterprise (DBE) Program – Item 5b

Dear Commissioners:

### **Executive Summary**

On July 28, 2005, TAM approved the draft DBE Program and FY2005/2006 overall goal. Subsequent to the incorporation of minor changes requested by Caltrans, TAM issued a public notice on November 3, 2005, beginning a 45-day comment period. No comments were received on the program or goal. A recent court ruling has since required Caltrans to review and consider amending its DBE program. Any changes to the Caltrans policy will affect TAM's program. Nonetheless, until a final determination is made, local agencies are requested to continue with their current program.

**Recommendation: Staff recommends that TAM adopt the DBE Program and 10% overall goal for FY2005/2006.**

Following the TAM Commission's approval of the draft DBE Program and overall DBE goal for FY2005/2006 on July 28, 2005, staff submitted the program to Caltrans for comment and approval. After incorporating non-substantive changes requested by Caltrans, notice of the program and the proposed overall goal was published in local and trade media on November 3, 2005, beginning a 45-day public comment period. In addition, notice of the program's availability was mailed to local Chambers of Commerce. As of the closing of the comment period on December 18, 2005, no comments had been received on the draft program.

On December 21, 2005, Caltrans issued a Public Notice, advising that they were considering amending their DBE program as required by a recent Ninth Circuit Court ruling. This ruling requires that Caltrans provide evidence of discrimination to justify the use of race-conscious measures (i.e., the use of DBE goals). Otherwise, the Department will be compelled to amend its DBE program to use only race-neutral measures to encourage DBE participation in federally-funded contracts. The comment period for the proposed amendment will end February 3, 2006. If Caltrans does modify their program, local agencies will be required to adopt the Caltrans program and will not be allowed to use DBE contract goals on federally-funded contracts. Details of the potential impact of this decision are outlined in the attached letter from Director Will Kempton. While the outcome of the Caltrans decision could affect TAM's DBE program, local agencies are being encouraged by Caltrans to continue with their programs, without modification, until that time.

**Recommendation:**

Staff recommends that TAM adopt the DBE Program and 10% overall goal for FY2005/2006.

**Attachments:**

Letter from W. Kempton, Caltrans, dated December 30, 2005

**DEPARTMENT OF TRANSPORTATION****OFFICE OF THE DIRECTOR**

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*Flex your power!  
Be energy efficient!*

December 30, 2005

Metropolitan Planning Organizations  
Regional Transportation Planning Agencies  
Local Transportation Commissions  
League of California Cities  
California State Association of Counties

Dear Executive Director:

The California Department of Transportation (Department) has had a successful Disadvantaged Business Enterprise (DBE) program for years and remains committed to the DBE program.

This letter is to advise you that the Department is required by a recent Ninth Circuit Court of Appeals decision to consider amending its current DBE program. In response to this court ruling, the Department has begun a 45-day public comment period during which it invites the submission of evidence and information that may support the use of mixed components of race-conscious and race-neutral measures to achieve the overall goal. The public notice was issued on December 21, 2005, and is available at the following website address: <http://www.dot.ca.gov/hq/LocalPrograms/>. After consideration of comments received during the 45-day public comment period, the Department will determine whether it is able to continue with any level of a race-conscious program this fiscal year or whether it is necessary to revise the goals to state that the specified level of DBE participation will be achieved solely by race-neutral measures.

We want to inform you of how the reassessment of the Department's DBE program will affect local agencies using federal-aid funds.

1. During the 45-day public comment period, local agencies should continue to use their race-conscious program and goals.
2. If the Department determines that it must revise its DBE program to be solely race-neutral, the Department anticipates that:
  - All local agencies will be required to immediately adopt and follow the statewide DBE program prepared by the Department. Local agencies will not be permitted to have, or to continue with, their own separate DBE programs, unless it has been approved directly by a federal agency. Local agencies are not required to go through a 45-day public participation period to initiate this change.
  - Local agencies shall no longer advertise or award contracts containing DBE race-conscious contract goals.

- Contracts with DBE race-conscious contract goals that have been opened but not awarded must be re-advertised with race-neutral contract language. The use of contract change orders to eliminate the race-conscious specifications is not acceptable.
- Contracts that have been advertised, but bids not yet opened, may proceed with an addendum specifying the race-neutral contract language and deleting any race-conscious goals.
- Contracts that were already awarded and approved prior to the Department's change to a race-neutral program will continue to be administered under the specifications and practices in place at the time of award. This includes DBE participation and substitution requirements.
- Local agencies will be required to continue collecting and reporting DBE participation commitments and final utilization on all contracts. Updated reporting forms will be provided.

The Department will prepare guidance for local agencies in the event a race-neutral program is adopted. In addition, information is being developed for posting on a website which will provide quick links to Frequently Asked Questions, new guidance, and update samples of race-neutral boiler plate specifications for contract documents.

The Department is undertaking a Disparity Study to identify and define the existence and scope of discrimination in the transportation contracting industry in California. The results of the Disparity Study will help the Department determine what percent of California's statewide DBE goal may be attained by the use of race-conscious measures, such as individual contract goals, if appropriate.

We will keep you informed as information becomes available. If you have any questions, please contact your District Deputy Director for Planning or District Local Assistance Engineer.

Sincerely,



WILL KEMPTON  
Director

c: Bruce Behrens, Chief Counsel  
Mark DeSio, Deputy Director, External Affairs  
Olivia Fonseca, Deputy Director, Civil Rights  
Joan Sollenberger, Acting Deputy Director, Planning & Modals  
District Directors  
Deputy District Directors for Local Assistance  
Deputy District Directors for Planning  
Bob Buckley, Chief, Engineering Services  
Steve Alston, Division Chief DPAC  
District Local Assistance Engineers

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Sincerely,



WILL KEMPTON  
Director

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